In the Supreme Court of the United States.

No. [redacted]326

October Term, [redacted] 1925

MORSE DRY DOCK & REPAIR COMPANY,

Petitioner,

against

S. S. NORTHERN STAR, her engines, etc., and HARRY LUBER, Intervening Petitioner,

Respondents.

NOTICE OF MOTION, PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

Barber & Stetson, Esqs.,
Proctors for Petitioner,
Office & P. O. Address,
32 Broadway,
Borough of Manhattan,
City of New York.

Arthur H. Stetson,
Of Counsel.

In the Supreme Court of the United States.

MORSE DRY DOCK & REPAIR COMPANY, Petitioner, against S. S. NORTHERN STAR, her engines, etc., and HARRY LUBER, Intervening Petitioner, Respondents.	October Term, 1924. No.

SIR:

PLEASE TAKE NOTICE that the annexed petition for a writ of certiorari and attached brief will be presented to the Supreme Court of the United States on the fifth Monday of March, 1925.

Dated New York, N. Y., March 10, 1925.

Yours, etc.,

BARBER & STETSON, ESQS.,
Proctors for Petitioner,
Office & P. O. Address,
#32 Broadway,
Borough of Manhattan,
City of New York.

ARTHUR H. STETSON,
Of Counsel.

To:

GERSON C. YOUNG, ESQ.,
Proctor for Respondent, Harry Luber,
80 Maiden Lane,
New York City.

43937

SUPREME COURT OF THE
UNITED STATES.

MORSE DRY DOCK & REPAIR COMPANY, Petitioner, against S. S. NORTHERN STAR, her engines, etc., and HARRY LUBER, Intervening Petitioner, Respondents.	October Term, 1924. No.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of the Morse Dry Dock & Repair Company respectfully shows:

This is an application for writ of certiorari to review a final decision of the Circuit Court of Appeals for the Second Circuit filed February 20, 1925, affirming in part and reversing in part a decree in admiralty of the District Court for the Eastern District of New York, dismissing libel filed to recover for repairs to the steamship "Northern Star."

Facts.

The petitioner, between November 14, 1920 and November 27, 1920, at the special instance and request of the American Star Line, Inc.,

then the owner of the steamship "Northern Star", ex "Waterbury," hereinafter called the steamship, performed certain work, labor and services and furnished certain supplies in making necessary repairs to said steamship of the agreed value of $1,705.87, no part of which has been paid.

The said American Star Line, Inc., was a New York Corporation and New York was the home port of the said steamship. On December 24, 1919, the United States of America, through the United States Shipping Board, transferred to the said American Star Line, Inc., the said steamship "Northern Star" then named the "Waterbury" by a document known as "Standard Form of Purchase Agreement." This agreement was never recorded.

On December 30, 1919, the United States of America, then the owner and holder of the legal title to the said steamship, acting by and through the United States Shipping Board, for a good and valuable consideration, duly executed and delivered to the said American Star Line, Inc., an absolute and unconditional bill of sale for said steamship, and on the same date the said American Star Line, Inc., being then the owner and holder of the legal title to the said steamship, for value received and to secure the payment of the balance of the purchase price of said vessel, executed, acknowledged and delivered to the United States of America purchase money mortgage in the sum of $1,217,437.50 covering the said steamship; and the said indebtedness was evidenced by ten (10) promissory notes totalling $1,217,437.50 executed by the said

American Star Line, Inc., and delivered to the United States of America, payment of which notes was secured by the aforesaid purchase money mortgage.

On August 11, 1920, the said bill of sale and said mortgage were received for record and recorded at the office of the Collector of Customs at the Custom House, in the port of New York. Neither the said bill of sale or mortgage contained any reference whatsoever to said "Purchase Agreement."

A certified copy of said mortgage was placed on board said vessel on September 23, 1920, and remained with the ship's papers and documents on said vessel at all times until some time subsequent to the making of the beforementioned repairs by the libelant herein.

Said steamship entered the port of New York, September 21, 1920 and cleared on September 22, 1920 and entered again some time before the said repairs were made in November, 1920, but no indorsement of the mortgage was made on the vessel's documents until the 27th day of June, 1921, when the aforesaid mortgage was indorsed on the documents of the said steamship by the Collector of Customs of the port of New York, as required by the provisions of Section 30 of the Act of June 5th, 1920, known and hereinafter referred to as the Ship Mortgage Act, 1920.

The said American Star Line, Inc., on the 30th day of December, 1920, defaulted in the payment of the interest and principal amount of the promissory note, which pursuant to the aforesaid mortgage, was due and payable on

the 30th day of December, 1920; and the right thereupon accrued to the United States of America, the then holder of the aforesaid mortgage on the said steamship to collect the entire indebtedness, payment of which was secured by the terms of said mortgage.

On the 4th day of August, 1923, the United States of America, represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, for good and valuable consideration, duly assigned, transferred and set over, all its rights, title and interest in and delivered to the said Harry Luber, the respondent herein, the aforesaid mortgage and the promissory notes therein referred to, payment of which was secured thereby. The aforesaid assignment of said mortgage was duly recorded by the Collector of Customs at the Custom House in the port of New York on August 11, 1923, Book P. M. 9, Page 10.

The District Court in its opinion held, that the Petitioner did not and could not acquire a maritime lien against the steamship because of the prohibition contained in the said mortgage against creating liens (fols. 405-406 of record); that the said mortgage acquired a preferred status on August 11, 1920, the date it was recorded in the office of the Collector of Customs and that the provision of the Ship Mortgage Act, 1920, for indorsing the fact of the mortgage on the ship's papers is directory and not mandatory (fols. 420-421 of Record).

The Circuit Court of Appeals held, to quote from its opinion, as follows:

"We hold that the libellant has a maritime lien which attached to the vessel but which is junior to the lien of the appellee Luber, and we hold that his mortgage is a preferred mortgage within the terms of the Act."

Questions Involved.

The question and propositions of law involved in this case are substantially as follows:

1. WAS THE MORTGAGE OF THE UNITED STATES ON THE SAID STEAMSHIP NORTHERN STAR A PREFERRED MORTGAGE WITHIN THE MEANING OF THE SHIP MORTGAGE ACT, 1920, AT THE TIME THE CLAIM OF THE PETITIONER ACCRUED?

2. IS NOT THE MARITIME LIEN OF THE PETITIONER A PREFERRED MARITIME LIEN WITHIN THE MEANING OF SUBSECTION M. OF THE ACT?

1. Was the mortgage of the United States on the said Steamship Northern Star a preferred mortgage within the meaning of the Ship Mortgage Act, 1920, at the time the claim of the Petitioner accrued?

The provisions of the Ship Mortgage Act defining a preferred mortgage and indicating what formalities must be complied with to give the mortgage a preferred status are found in Subsection D of the Act which is as follows:

"Subsection D:

(a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, *if*—(Italics ours),

(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so indorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enum-

erated in this subsection is hereafter in this section called a 'preferred mortgage' as to such vessel."

The foregoing extracts from the Ship Mortgage Act indicate the importance given to the word "Indorsement" as used therein and its significance and importance is further emphasized by the following subsections, reading as follows, (Italics ours)

"Subsection C: (5) (c)

There shall be *indorsed* upon the documents of a vessel covered by a preferred mortgage:

(1) The names of the mortgagor and mortgagee;

(2) The time and date the *indorsement* is made;

(3) The amount and date of the maturity of the mortgage; and

(4) Any amount required to be *indorsed* by the provisions of sub-division (e) or (f) of this sub-section.

(d) Such *indorsement* shall be made * * * *and no clearance shall be issued to the vessel until such indorsement is made.* The Collector of Customs at the Port of Documentation shall give such direction by wire

or letter at the request of the mortgagee, etc. Whenever any new document is issued for a vessel such *indorsement* should be transferred to and *indorsed* upon the new document by the Collector of Customs."

"Subsection F:

The Mortgagor * * * (2) without the consent of the mortgagee shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have *indorsements* in respect thereto made upon the documents of the vessels," etc.

"Subsection M, (a):

When used hereinafter in this section, the term 'Preferred Maritime Lien' means (1) a lien arising prior in time to the recording *and indorsement* of a preferred mortgage in acordance with the provisions of this section," etc.

"Subsection V:

The Secretary of Commerce is authorized and directed to furnish Collectors of Customs with all necessary books and records, and with certificates of registry and of enrollment and license, in such form as provides for the making of all *indorsements* thereupon required by this section."

"Subsection W:

The Secretary of Commerce is authorized to make such regulations in respect to the recording *and indorsing* of mortgages covering vessels of the United States, as he deems necessary to the efficient execution of the provisions of this section."

2. Is not the maritime lien of the Petitioner a preferred maritime lien within the meaning of Subsection M of the Act?

Subsection M.

(a) When used hereinafter in this section, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section; or (a) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L shall be held terminated and shall thereafter attach, in

like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed by the court."

It is respectfully urged that the Circuit Court of Appeals erred in the conclusions which it reached on the two questions before stated and in holding, as it in effect did, that the word "indorsement" as used throughout the Ship Mortgage Act, 1920 is entitled to no consideration whatever in spite of the fact that the word was designedly used by Congress and the terms of the Act on this point clear and unambiguous.

Wherefore your Petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

MORSE DRY DOCK & REPAIR COMPANY,
By Edward P. Morse
Pgd

BARBER & STETSON, ESQS.,
Proctors for Petitioner,
Office & P. O. Address,
32 Broadway,
Borough of Manhattan,
City of New York.

ARTHUR H. STETSON,
Of Counsel.

Southern District of New York: ss.

EDWARD P. MORSE, being duly sworn, deposes and says:—

That I am an officer of the Morse Dry Dock & Repair Company, the petitioner herein, to wit, the treasurer thereof.

I have read the foregoing petition and know the contents thereof and the allegations therein contained are true to the best of my knowledge and belief.

Edward P Morse
EDWARD P. MORSE. Sgd

Sworn to before me this
13 day of March, 1925.

Margaret Ernst
Notary Public.

Notary Public Bronx Co. No. 37 Reg. No. .....
(Notarial Seal) Cert. filed in N. Y. Co. No. 192 Reg. No. 2[illegible]
Commission expires March 30th, 1926

We hereby certify that we have examined the foregoing petition and in our opinion it is well founded and entitled to favorable consideration by the Court.

Dated, New York, N. Y. March 13, 1925.

Barber & Stetson
Sgd
Proctors for Petitioner,
Office & P. O. Address,
32 Broadway,
Borough of Manhattan,
City of New York.

Archer H Stetson
Sgd
Of Counsel.

BRIEF IN SUPPORT OF MOTION.

SUPREME COURT OF THE
UNITED STATES.

MORSE DRY DOCK & REPAIR COMPANY, Petitioner, against SS "NORTHERN STAR" her engines, etc., and HARRY LUBER, INTERVENING PETITIONER, Respondents.	October Term, 1924. No.

POINT I.

The provision for indorsement of the mortgage on the vessel's documents is mandatory and must be complied with before the mortgage can have a preferred status.

There are two reported cases which deal with the effect of the failure to indorse the mortgage on the vessel's documents:

"*The Nanking*", 292 Fed., 641, decided by the District Court for the Northern District of California.

While this case deals with the question of the effect of failure of making indorsement on the

ship's papers, it is not in point with the question of indorsement as raised by the Petitioner in the instant case. There the fact of the mortgage was actually indorsed upon the ship's papers and the point involving the indorsement arises under subdivision (1) (c) (4) and (e) of subsection (d) of the Ship Mortgage Act, the purpose of which is to take care of a situation where property other than a vessel is included in a preferred mortgage.

The question, whether the failure to make any indorsement whatever of the fact of the mortgage upon the ship's documents, deprives the mortgage of its status as a preferred mortgage, as to parties who have rendered services to the vessel and upon the credit of the vessel, was not raised in any way in "The Nanking" case.

Even if the court there was referring to the indorsement of the existence of a mortgage, (which was, however, not in question) his language merely is that he would not hold the mortgage void for lack of indorsement. This does not mean that he would give it a preferred status had there been no indorsement whatever.

The Petitioner does not claim that the failure to indorse the mortgage on the vessel's documents renders the mortgage void in invalid but that such failure leaves the mortgage as an ordinary and not preferred mortgage.

"*The Northern Ware*", 298 Fed. 188, decided in the District Court, Eastern District of Pennsylvannia, April 9, 1924.

This case is authority for the proposition before set forth, that the provision for the in-

dorsement of the fact of the mortgage on the ship's documents is mandatory and not merely directory.

To quote from the opinion of the court, in this case:

> "The mortgage upon the 'Northern Wave' was dated as of October 22, 1920, but was executed, acknowledged and recorded in the Custom House at Baltimore, Maryland on November 30, 1920. A certificate of delivery of the vessel to the West Indian Navigation Co., Inc., as purchaser, on October 28, 1920 was executed November 10, 1920. The certificate of registry, issued by the Collector of Customs at Baltimore, Maryland is dated December 14, 1920. At the time of the furnishing of supplies and the rendering of services while the vessel was lying in the port of Philadelphia, for which liens are claimed, there was no indorsement upon the ship's documents required to make it a preferred mortgage under the Ship Mortgage Act of 1920, Section 30, subsection D, (Comp. St. Ann. Supp. 1923, Section 8146¼ kkk) and indorsement was not made until January 4, 1921. The Commissioner distinguished the case from 'The Cleo' case upon the ground that the vessel in that case was under charter, the person ordering supplies was not the owner, and the supply man was put upon inquiry.
>
> It is conceded, in the present case, that the lien claimants did not make any inquiry

concerning the authority of the owner to bind the vessel.

The mortgagee is protected by the Act of 1920 in making the mortgage a preferred one by having it indorsed upon the ship's papers. Under these circumstances, what would reasonable diligence have revealed by investigations? If the lien claimants had examined the ship's papers they would have shown that the West Indian Navigation Company was the owner of the vessel and that there was no indorsement upon the ship's papers of the mortgage under which claim is made.

Would reasonable diligence require the lien claimants, knowing that a mortgagee could obtain a preferred status for his mortgage and obtain protection against liens by having it indorsed upon the ship's papers, to do more than examine the ship's papers? Would reasonable diligence suggest lack of diligence on the part of the party more interested in protecting the vessel against lien? Would reasonable diligence require the lien claimants to have an examination made of the records at Baltimore to ascertain whether a mortgage was recorded there, and whether the owner had, by the terms of the mortgage, limited his authority to create liens? I think not. * * *"

Also "*The Bethlehem*", 286 Fed. 400.

The case of "*The Egeria*", 294 Fed. 791, cited and commented upon by the respondent, Luber, in his brief in the Circuit Court of Appeals and by that Court in its opinion is not applicable to

the questions raised in the instant case on the effect of the failure to indorse the fact of the mortgage on the vessel's documents. That case deals with the effect of the failure to allege the fact of indorsement in the pleadings in an action to foreclose a preferred mortgage. The question of the effect of the failure to make an indorsement as applying to the rights of a party who has acquired a maritime lien on the vessel prior to the making of the indorsement did not arise and was not considered.

Both the District Court and the Circuit Court of Appeals, in opinions rendered, discuss at some length the duty of the Collector of Customs and the responsibility of the mortgagee in the matter of making the indorsement, but it is submitted that whatever may be the conclusion reached on these points, it cannot effect the rights of the petitioner herein. Its rights must be determined by the application of the statute to certain established facts which are that the work of the petitioner was done in November, 1920; that the vessel involved actually entered the port of New York on September 21, 1920, and that no indorsement of the mortgage was made on the vessel's documents until June 27th, 1928.

It is difficult to believe, that Congress, after using the word "indorsement" on fifteen or more occasions in this Act, did not intend that it should carry some weight and be of some significance.

POINT II.

The martime lien of the petitioner has a preferred status under subsection M of the act and is superior to the mortgage herein even though that mortgage acquired a preferred status from August 11, 1920, the date it was recorded.

The definition of a preferred maritime lien, as contained in subsection M (a) and (b), which subsection is quoted in full in the foregoing petition, clearly indicates that it was the intention of Congress to give the preferred status to any maritime liens which might be created prior not only to the recording, but also to the indorsing of the mortgage. The expression "recording and indorsement", as used in this section, is conjunctive and the maritime lien of the petitioner having arisen before the making of the indorsement entitles it to have its claim classified as a preferred maritime lien within the meaning of the statute. If Congress had intended that the recording of a mortgage alone would be sufficient to prevent any maritime liens acquired thereafter becoming preferred maritime liens there would have been no occasion whatever for the use of the word "indorsement" in this connection.

Regardless of whether indorsement is mandatory to give a mortgage a preferred status, in any event subsection M expressly provides that the mortgage shall be subordinated to a lien arising under the conditions mentioned therein.

When Congress gave to the holders of mortgages on vessels of the United States a method by which they could obtain a preference for their mortgages over all claims, it also imposed upon them certain duties and obligations, the principal of which were the recording and indorsement of the mortgage.

It is not reasonable to ask of any Court in construing this Act that a mortgagee be held strictly to its requirements if he is to claim its benefits?

In conclusion, it is respectfully submitted that to eliminate from consideration and to give no effect whatever to the word "indorsement" as used in the Act, will not only deprive this Petitioner of substantial rights, but also will establish a dangerous precedent in the law affecting the construction of statutes.

This petition should be granted.

Dated New York, N. Y., March 10, 1925.

BARBER & STETSON,
Poctors for Petitioner.

ARTHUR H. STETSON,
Of Counsel.

United States Supreme Court
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In the Supreme Court of the United States.

No. 326.
October Term, 1925.

MORSE DRY DOCK & REPAIR COMPANY,
Petitioner,

vs.

S. S. NORTHERN STAR, her engines, etc.;
HARRY LUBER,
Intervening-Petitioner-Respondent.

BRIEF OF MORSE DRY DOCK & REPAIR COMPANY, PETITIONER.

Writ of Certiorari to the United States Circuit Court of Appeals, for the Second Circuit.

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City of New York.

Arthur H. Stetson,
Of Counsel.

INDEX.

	PAGE
Preliminary Statement	1
Jurisdiction	3
Statement of Facts	9
Specifications of Error	14
Argument—Point I	15
Point II	29

Cases and Texts Cited.

American Construction Co. vs. Jacksonville Railway Company, 148 U. S. 372	7
Columbus Watch Co. vs. Robbins, 148 U. S. 266	7
Corona Company vs. United States, 263 U. S. 537	28
Fields vs. United States, 205 U. S. 292	5
Heitz vs. Ruppert, 218 N. Y. 148	37
Jerome H. Remick & Co. vs. American Automobile Accessories Company, 298 Fed. 628	29
Knickerbocker Trust Co. vs. Penn Cordage Company, 65 N. J. E. 181	25
Magnum Import Company vs. Coty, 262 U. S. 169	6
McMullen vs. Hoffman, 174 U. S. 639	6
Rice et al. vs. United States, 53 Fed. 910	37
Robertson, Commissioner of Patents vs. United States, 285 Fed. 911	28
Russell Motor Car Company vs. United States, 261 U. S. 514	27
St. Louis Iron Mountain & Southern Railway Company vs. Taylor Administratrix, 210 U. S. 281	28
Standard Oil Company vs. Anderson, 212 U. S. 215	7
The Anna E. Morse, 286 Fed. 797	34
The Bergen, 7 F. (2nd) 379	26
The Bethlehem, 4 F. (2nd) 308	18

PAGE

The Buckhannon, 299 Fed. 519 33
The Egeria, 294 Fed. 791 21
The Kensington, 183 U. S. 263 5
The Moshulu, 298 Fed. 348 21
The Nanking, 292 Fed. 642 21
The Northern Wave, 4 F. (2nd) 308 18
The Owego, 292 Fed. 403 21
The Oconee, 280 Fed. 927 21
The Three Friends, 166 U. S. 1 4
Workman vs. New York City, 179 U. S. 552 5

In the Supreme Court of the United States.

No. 326.
October Term, 1925.

Morse Dry Dock & Repair Company,
Petitioner,
vs.
S. S. Northern Star, her engines, etc., Harry Luber,
Intervening-Petitioner-Respondent.

BRIEF OF MORSE DRY DOCK & REPAIR COMPANY, PETITIONER.

Preliminary Statement.

This case is before this Court by reason of the allowance of a writ of certiorari for review of a judgment of the Circuit Court of Appeals for the Second Circuit.

The case originated in the United States District Court for the Eastern District of New York, and the opinion of that Court by Campbell, Judge, is reported in 295 Fed. 366 (R-60 to 66 inclusive). The opinion of the Circuit Court of Appeals, by Manton, Judge, is reported in 7 F. (2d) 505 (R. 94 to 97 inclusive).

The judgment sought to be reviewed was entered on February 27th, 1925 (R. 97-98).

The questions of law which this Court is asked to consider arise in connection with the construction and interpretation of certain provisions of Section 30, Ship Mortgage Act, 1920, 41 Stat. L. 1005, hereinafter referred to as Ship Mortgage Act 1920, and involve the right of the Petitioner herein to have the maritime lien on said steamship, to which the Circuit Court of Appeals held it was entitled, given priority over a certain mortgage on said steamship held by the said Respondent, Luber.

The Petitioner herein claims:

1. That the mortgage held by the said Intervening Petitioner, Luber, on said steamship was not, at the time its claim for repairs accrued, a preferred mortgage within the meaning of the Ship Mortgage Act 1920.

2. That the maritime lien acquired by it on said steamship is a preferred maritime lien within the meaning of subsection M, of the Ship Mortgage Act 1920.

The District Court, in its opinion, held that the Petitioner herein did not acquire a maritime lien against the steamship because of the prohibition contained in the mortgage against creating liens (R. 63-64); that the said mortgage acquired a preferred status on August 11, 1920, the date it was recorded in the office of the Collector of Customs and that the provision of the Ship Mortgage Act 1920 for indorsing the fact of the mortgage on the ship's papers is directory and not mandatory (R. 66).

The Circuit Court of Appeals reversed in part, and affirmed in part the decree entered upon the said opinion of the District Court and the following extract is quoted from its opinion.

> "We hold that the libelant has a maritime lien which attaches to the vessel, but which is junior

to the lien of the appellee, Luber, and we hold that his mortgage is a preferred mortgage within the terms of the Act" (R. 97).

Jurisdiction.

The jurisdiction of this Court is invoked under the following statutes:

"In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court" (36 Stat. L. 1157).

"The circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section Two hundred thirty-eight, unless otherwise provided by law; and, except as provided in Sections Two hundred thirty-nine and Two hundred forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases aris-

ing under the patent laws, under the trade mark laws, under the copyright laws, under the revenue laws and under the criminal laws, and in admiralty cases'' (36 Stat. L., 1133 as amended by 38 Stat. L. 803).

Reference is made to the following cases as sustaining the jurisdiction of this Court.

The case of *''The Three Friends''*, 166 U. S. 1, was an action in admiralty involving the rights of the United States to seize the vessel for alleged violation of neutrality laws. The Court, in passing upon the sufficiency of grounds for certiorari, said in course of its opinion, at page 49:

> ''It is objected that the decree was not final, but, inasmuch as the libel was ordered to stand dismissed if not amended within ten days, the prosecution of the appeal, within that time, was an election to waive the right to amend and the decree of dismissal took effect immediately.
>
> In admiralty cases, among others enumerated, the decree of the Circuit Court of Appeals is made final in that court by the terms of section six of the Judiciary Act of March 3, 1891, but this court may require any such case, by certiorari or otherwise, to be certified 'for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,' that is, as if it had been brought directly from the District or the Circuit Court, 26 Stat. 826, 828, c. 517, § 6.
>
> Accordingly the writ of certiorari may be issued in such cases to the Circuit Court of Appeals, pending action by that court, and, although this is a power not ordinarily to be exercised,

> American Construction Co. v. Jacksonville Railway, 148, U. S. 372, 385, we were of opinion that the circumstances justified the allowance of the writ in this instance, and the case is properly before us."

Certiorari was granted in the case of *The Kensington*, 183 U. S. 263. This was an action in admiralty in which it was sought to recover the value of passengers' baggage, which it was alleged the ship had wrongfully failed to deliver.

In the case of *Workman* vs. *New York City, Mayor, Alderman and Commonalty*, 179 U. S. 552, which was an action in admiralty. The District Court entered a decree in favor of the libelant against the City. The Circuit Court of Appeals for the *Second Circuit* to which the case was taken, affirmed in part and modified in part the decree of the District Court, and the case was then brought to the United States Supreme Court by the allowance of a writ of certiorari.

In the case of *Fields* vs. *United States*, 205, U. S. 292, Mr. Justice Brewer in commenting upon grounds necessary to sustain a certiorari proceeding, at page 296, said:

> "In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court.
>
> However important the case may be to the applicant, it is not one of gravity and general importance. There is no conflict between decisions of State and Federal courts or between those of Federal Courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed, no matter of general interest to the public."

The following are a few of the instances where certiorari has been granted by this Court.

In the case of *McMullen* vs. *Hoffman* (1899), 174 U. S., 639, at page 644, the Supreme Court said:

> "* * * There is a difference of opinion in the courts below (in this case) as to the law applicable to the case. The question is one of importance, involving as it does the principles which should control in regard to the procurement of contracts at public lettings for work to be awarded to the lowest bidder. Assuming the same facts, the courts below have come to opposite conclusions upon the character of the contract, and upon the right of the complainant to obtain redress for his alleged wrongs.
>
> It was on account of the general importance of the question and the many lettings for public works by the government and by municipal corporations which are affected by the law relative to bidding, that this court thought it a proper case to issue the writ of certiorari herein. The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them and, so far as possible to remove the doubts which seemingly have arisen in this branch of the law."

Magnum Import Company, Inc., v. *Coty*, 262 U. S., 169. Mr. Chief Justice Taft, at page 162, said:

> "Under Section 262 of the Judicial Code this Court is given power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law. Here the jurisdiction of this Court to grant the

application for certiorari already made and pending is conferred by Section 240 of the Judicial Code. That section provides that in any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final, it shall be competent for this Court, by certiorari upon the petition of a party thereto to bring the case here for review as if it had come by error or appeal. By Section 128 of the Judicial Code, as amended by the Act of January 28, 1915, c 22, Sec. 2, 38 Stat. 803, the judgment or decree of the Circuit Court of Appeals is made final in trade mark cases."

"The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes, first, to secure uniformity of decisions between those courts in the nine circuits and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort."

Standard Oil Company v. *Anderson* (1909), 212 U. S., 215, the Court said:

"The case is here by certiorari from the Circuit Court of Appeals, which affirmed the judgment of the Circuit Court because of the supposed conflict of decision in the lower Federal Courts."

Columbus Watch Company vs. *Robbins,* 148 U. S., 266, conflict in judgments between different Circuit Courts of Appeals under same conditions.

American Construction Company vs. *Jacksonville Railway,* 148 U. S., 372, the Court said at page 383:

> "In the same spirit, the authority conferred on this court by the very provision on which the petitioners mainly rely, by which it is enacted that 'in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,' has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

In the instant case there exist many of the grounds held by this Court as sufficient for certiorari.

(a) It presents for consideration in the determination as to what constitutes a "preferred mortgage" and a "preferred maritime lien" within the meaning of that most important Act of Congress, the Ship Mortgage Act 1920, questions of gravity and importance.

(b) The final determination of these questions is of the utmost importance to the Government of the United States, to private ship owners and builders, to ship supply and repair men, to persons financing the building and operation of ships and indeed, to every interest involved in the marine industry not only in this but in foreign countries.

(c) There exists a conflict of decisions between Federal Courts of different circuits as to what constitutes a preferred mortgage within the meaning of the Act.

(d) To further indicate the importance of the questions involved and the extent of public interest therein, we believe it not improper to state that there are at the present time pending in the United States District Court, Eastern District of New York, eight cases and in the District Court of New Jersey, five cases and awaiting a decision in this case on questions raised herein.

Statement of Facts.

At the trial of this case in the District Court, the libelant, the Petitioner herein, and the Intervening Petitioner, the Respondent herein, entered into a stipulation covering certain of the material facts involved. The stipulation (R. 8, 9, 10) is short and for accuracy and convenience, we ask the Court's indulgence if we reproduce it in full.

> "For the purpose of the trial in this action, IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties hereto, as follows:
>
> FIRST: That the libelant herein, Morse Dry Dock & Repair Company, during the period from November 14, 1920, to November 27, 1920, both dates inclusive, furnished to the steamship NORTHERN STAR, certain repairs, supplies and services as more fully appears from the bills annexed hereto marked Exhibit A, made a part hereof and hereby offered in evidence in behalf of the libelant the net charges as shown by said Exhibit A amounting, exclusive of interest, to the sum of $1,705.87, are fair and reasonable charges for the repairs, supplies and services so furnished; the said bills are offered in lieu of evi-

dence of the charges therein contained and not in any way as an admission on the part of Harry Luber, intervening petitioner and libelant herein that the repairs, supplies and services aforesaid, were furnished on the credit of the said steamship.

SECOND: That on or about the 9th day of August, 1920, the American Star Line, Inc., the owner and holder of the legal title to the said Steamship Northern Star, for value received and to secure the payment of the balance of the purchase price to the said vessel, executed and acknowledged and delivered to the United States of America a purchase money mortgage in the sum of $1,217,437.50 covering the said Steamship Northern Star; that the said indebtedness was evidenced by ten promissory notes totalling $1,217,437.50 executed by the American Star Line, Inc., and delivered to the United States of America payment of which notes was secured by the aforesaid purchase money mortgage; a true and correct copy of the aforesaid mortgage is annexed hereto, marked Exhibit B, made a part hereof and hereby offered in evidence with the same force and effect as if it were the original thereof.

THIRD: That on the 11th day of August, 1920, there was received for record in the office of the Collector of Customs at the Custom House in the Port of New York a bill of sale for the Steamship Northern Star by which the United States of America through the United States Shipping Board conveyed title to the aforesaid steamer to the American Star Line, Inc.; that on the same day, namely, August 11, 1920, and at approximately the same hour of that day, there was re-

ceived for record at the aforesaid office of the Collector of Customs, at the Custom House, in the Port of New York, a purchase money mortgage on the steamship Northern Star in the sum of $1,217,437.50 from the American Star Line, Inc., to the United States of America; the aforesaid bill of sale was recorded on August 11, 1920, in Book R. 171, No. 6, and the aforesaid mortgage was recorded in Book P. M. 1, page 58.

FOURTH: That on the 27th day of June, 1921, the record of the aforesaid mortgage was endorsed on the documents of the Steamship Northern Star by the Collector of the Port of New York as required by the provisions of Section 30 of the Act of June 5, 1920, known as the 'Ship Mortgage Act, 1920'.

FIFTH: That the American Star Line, Inc. on the 30th day of December, 1920, defaulted in the payment of the interest and principal amount of the promissory note which pursuant to the aforesaid mortgage was due and payable on the 30th day of December, 1920; that the right thereupon accrued to the United States of America, the then holder of the aforesaid mortgage on the said vessel, to collect the entire indebtedness, the payment of which was secured by the terms of the said mortgage.

SIXTH: That on the 4th day of August, 1923, the United States of America, represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, for good and valuable consideration, duly assigned, transferred and set over all the right, title and interest in and de-

livered unto Harry Luber, intervening petitioner and libelant herein, the aforesaid mortgage and the promissory notes therein referred to, payment whereof was secured thereby; the aforesaid assignment of said mortgage was duly recorded by the Collector of Customs, at the Custom House in the Port of New York on August 11, 1923, in Book P. M. 9, page 10; the aforesaid assignment of mortgage is hereto annexed and marked Exhibit C, made a part hereof and hereby offered in evidence.

SEVENTH: IT IS HEREBY FURTHER STIPULATED AND AGREED, that the libel herein may be and hereby is amended so as to change the date of November 17, 1920, set forth in Article Fourth thereof, to November 27, 1920; that it be further amended so as to include an allegation in paragraph third thereof to the effect that the Steamship Northern Star on the date of the verification of the libel, was in the custody of the United States District Court for the Eastern District of New York.

EIGHTH: IT IS HEREBY FURTHER STIPULATED AND AGREED, that the intervening petition and the answer to the libel herein may be and hereby are amended so as to include the further separate defense in the answer and the further allegation in the intervening petition, as follows:

'That by the terms of the aforesaid mortgage on the Steamship Northern Star given by the American Star Line, Inc., to the United States of America, the creation of any maritime liens upon the Steamship Northern Star

of any liens which would rank prior to the lien of the mortgagee was prohibited and that the libelant herein cannot have any lien on said vessel for the repairs, supplies and services alleged in the libel.'

NINTH: IT IS HEREBY FURTHER STIPULATED AND AGREED that the answer of the libelant Morse Dry Dock & Repair Company herein to the said intervening petition be and it hereby is amended by adding thereto an allegation denying the matters set forth in the preceding paragraph hereof.''

Dated, New York, November 12th, 1923.

In addition to the foregoing facts, the evidence showed and the District Court found certain facts (which were upheld by the Circuit Court) as follows:

That the said repairs, services and supplies were furnished at the special instance and request of Mr. Garmey, consulting engineer, who was retained by the American Star Line, Inc., then the owner of said steamship Northern Star (R. 61).

That a certified copy of said mortgage was placed on board said steamship on September 23, 1920, and remained with the ship's papers and documents on said steamship at all times until some time subsequent to the making of the beforementioned repairs (R. 61).

That said steamship entered the port of New York on September 21, 1920, and cleared on September 22, 1920, and entered again some time before said repairs were made (R. 61).

While this case was pending in the Circuit Court of Appeals, the said intervening petitioner, appellee, over the objection of the said libelant, appellant, was allowed to take new evidence in form of a certain agree-

ment of sale of said steamship from the United States of America to the said American Star Line, Inc. This agreement was dated December 24, 1919, and is set forth in full in the Record, pages 81 and 93 inclusive. It was never recorded.

There was introduced in evidence by the said libelant-appellant, a bill of sale of said steamship from the United States of America to the said American Star Line, Inc., given in pursuance of said agreement which was dated and signed on December 30, 1919, acknowledged on April 20, 1920, and recorded in the office of the Collector of Customs for the Port of New York on August 11, 1920. The bill of sale is set forth in full in the record immediately following page 92.

Specifications of Error.

1. The Court erred in holding that the mortgage on said steamship held by the said intervening petitioner, appellee, Luber, was a preferred mortgage within the meaning of the Ship Mortgage Act, 1920, at the time the claim of the said libelant-appellant, Morse Dry Dock and Repair Company accrued (R. 97).

2. The Court erred in failing to find that the provisions of the Ship Mortgage Act, 1920, for indorsing the fact of the mortgage on the ship's papers was mandatory and that such indorsement was necessary to give the mortgage a preferred status.

3. The Court erred in failing to find that the said libelant-appellant, had a preferred maritime lien on said steamship within the meaning of subsection M of the Ship Mortgage Act, 1920.

4. The Court erred in holding that the maritime lien of the libelant-appellant was junior to that of the intervening petitioner, appellee, Luber (R. 97).

ARGUMENT.

POINT I.

In order that a mortgage should have a preferred status within the meaning of the "Ship Mortgage Act of 1920" the provisions of the act relative to the indorsement of the mortgage on the vessel's documents must be fully complied with. This provision is mandatory.

The following provisions of the act are pertinent:

"Subsection D:

(a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and *as of the date of the compliance with all the provisions* of this sub-division, the preferred status given by the provisions of sub-section M, *if*

(1) The mortgage *is indorsed* upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in sub-section C, together with the time and date when the mortgage is so indorsed;

Note: Italics throughout the brief are ours, unless otherwise stated.

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor to the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage *which complies in respect to any vessel with the conditions enumerated in this subsection* is hereafter in this section called 'preferred mortgage' as to such vessel.

(c) There shall be *indorsed* upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and the mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

(d) Such indorsement shall be made (1), by the collector of customs of any port of documenta-

> tion of the mortgaged vessel, or (2), by the collector of customs of the port in which the vessel, is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs."

It must be kept in mind in construing the provisions of the Ship Mortgage Act, that it effected a decided change in the law with respect to the rights of repair companies and mortgagees of vessels. A reading of the report of the hearings before the House Committee on Merchant Marine and Fisheries, House Report No. 8442, 66th Congress, First and Second Sessions 1919-1920, cannot but establish the conviction that in giving to a mortgagee the opportunity to have his mortgage classified as a "Preferred Mortgage" it was in the minds of the enactors of the law to impose certain obligations and to say that these obligations are directory merely is clearly unwarranted. The Law must be applied as its stands. If its provisions are unreasonable or unnecessary the remedy rests with Congress. To modify it is beyond the power of any Court.

The Act clearly defines a preferred mortgage. To give to the mortgagee the benefit of a "preferred mortgage" the mortgagee must show that he has complied with all the provisions of the Act in this respect—the burden is upon him to do this.

It is difficult to conceive how Congress could have more clearly expressed its intention of making indorsement of the mortgage a mandatory provision than it did in Subsection D, paragraph (a) when it says: "A valid mortgage * * * shall in addition have in respect to such vessel *and as of the date of compliance* with all the provisions of this subsection", etc. There is no uncertainty or ambiguity in the words giving this unusual right and privilege.

That we are unable to cite in support of our contention any cases exactly in point is not strange when we consider that we are dealing with a statute, the requirements of which are so clear that any argument attempting to explain it is superfluous.

The case most nearly in point and which sustains the contention of the Petitioner on this point is *"The Northern Wave"*, 4 F. (2nd) 308. In this case and a similar case, *"The Bethlehem"*, 4 F. (2nd) 308, decided March 4, 1925, by the Circuit Court of Appeals, Third Circuit, certain libelants sought to recover the value of repairs furnished to these ships between the date of their delivery to the purchasers, the West Indian Navigation Company, which had given a purchase money mortgage to the United States Shipping Board, the seller, and the date of the indorsement of the mortgages on the ship's papers.

On the question of indorsement of the mortgage on the ship's documents, the Court, in its opinion at page 311 said:

> "Even if during the period before or at the time the supplies were delivered and the repairs made, the libellants had prosecuted an investigation and had come across the ship's papers somewhere, they would not have found endorsements of the mortgages on them, *for this essential act* was not performed until January 14, 1921, which

was after the libellants had begun and in some instances had completed furnishing supplies and making repairs. So, it was not until that date that the libellants could have found the provision in the mortgages against the owner incurring liens upon the ships, unless, indeed, without any suggestion from any available source the law required them to go to Baltimore, their home port, and search the ship's titles. We do not believe the statute, in demanding of the furnisher 'the exercise of reasonable diligence' in ascertaining the owner's authority to bind the ship, intends by the word 'reasonable' that the furnisher shall in every instance make an investigation complete in all details even to visiting the home port and searching the title of the ship. We are led to this conclusion because otherwise the Act of 1910, the forerunner of the Act of 1920, which was enacted to relieve furnishers from the rigor of the law as it then existed, as well as to facilitate navigation, would be ineffective and purposeless. We are therefore, of opinion that if the libellants in these cases had with reasonable diligence made the investigation which the law required of them, they would have discovered nothing that would have withdrawn from them the presumption of the owner's authority given by a preceding section of the Act."

The Respondent in brief, filed in this court in opposition to the petition for writ of certiorari, undertakes to differentiate between these cases and the case at bar with the statement "As a matter of fact, these cases did not in any way pass upon the preferred status of a mortgage, but the principal question involved in them was the libelant's right to any maritime lien" (Brief 13-14).

It is submitted that this statement is not correct as the court plainly indicated that in its opinion the mortgage was not entitled to a preferred status when it said in that part of the opinion above quoted, when referring to the indorsement of the mortgage on the ship's documents, "for this essential act was not performed until January 14th, 1921, which was after the libelants had begun and in some instances had completed furnishing supplies and making repairs."

Again the Respondent, in the same brief (pages 14-15) undertakes to give the same importance to the provision for carrying copies of the mortgages on the ship as that of indorsing the mortgages on the ship's documents.

The provision for the carrying of a copy of the mortgage is found in subsection E, which, for convenience, is quoted herewith:

> "Subsection E. The collector of customs, upon the recording of a preferred mortgage, shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof."

This provision is directory merely and has to do with the handling of the mortgage after it has been recorded.

The provisions for indorsement, *supra*, are mandatory

and the strict compliance with their requirements constitute a condition precedent to giving the mortgage the classification of a "preferred" mortgage within the meaning of the Act.

In support of this contention that the provisions of the Ship Mortgage Act, 1920, as to indorsement are directory and not mandatory, the Respondent apparently relies strongly on the following enumerated cases and we beg leave to submit our comments thereon.

"The Nanking", 292 Fed. 642; *"The Egeria"*, 294 Fed. 791; *"The Oconee"*, 280 Fed. 927; *"The Owego"*, 292 Fed. 403; *"The Moshulu"*, 298 Fed. 348.

The Nanking case, while it deals with the question of the effect of failure of making indorsement on the ship's papers, it is not in point with the question of indorsement as raised by the Petitioner in the instant case. There the fact of the mortgage was actually indorsed upon the ship's papers and the point involving the indorsement arises under subdivision (1) (c) (4) and (e) of subsection (d) of the Ship Mortgage Act, the purpose of which is to take care of a situation where property other than a vessel is included in a preferred mortgage.

The question, whether the failure to make any indorsement whatever of the fact of the mortgage upon the ship's documents, deprives the mortgage of its status as a preferred mortgage, as to parties who have rendered services to the vessel and upon the credit of the vessel, was not raised in any way in the Nanking case.

Even if the court there was referring to the indorsement of the existence of a mortgage (which was, however, not in question), his language merely is that he would not hold the mortgage void for lack of indorsement. This does not mean he would give it a preferred status had there been no indorsement whatever.

The Petitioner does not claim that the failure to indorse the mortgage on the vessel's documents renders the mortgage void or invalid, but that such failure leaves the mortgage as an *ordinary* and not preferred mortgage.

The case of "The Egeria" is not applicable to the questions raised in the instant case on the effect of the failure to indorse the fact of the mortgage on the vessel's documents. That case deals with the effect of the failure to allege the fact of indorsement in the pleadings in an action to foreclose a preferred mortgage. The question of the effect of the failure to make an indorsement as applying to the rights of a party who has acquired a maritime lien on the vessel prior to the making of the indorsement did not arise and was not considered.

"The Oconee" case, when carefully read, will be found to uphold the Petitioner's contention that the indorsement of the mortgage is essential and constitutes a *condition precedent* to giving the mortgage a preferred status.

The Court at page 929 says:

> "The Ship Mortgage Act is a part of the Merchant Marine Act of June 5, 1920, 41, Stat. 1000. In order to provide an American merchant marine 'sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in the time of war', and in order to encourage investment in ships and the financing of maritime ventures, Congress, in subsection C (a) of the act mentioned, provided a method whereby a mortgage on a vessel of the United States should have a preferred status. Certain *prerequisites* are provided in the act to be done by the mortgagor or the mortgagee, or both,

in order that the benefits of the provision may accrue—for instance: The vessel must be a vessel of the United States of 200 gross tons or upward; the mortgage must include the whole of the vessel; *the mortgage must be indorsed upon the vessel's documents;* it must be recorded as required, together with the time and date when the mortgage is so indorsed; an affidavit of good faith must be filed with the record; there must be no waiver therein of the preferred status, and the mortgagee must not be an alien. In the case now under consideration it is conceded that all of the *requirements* just named *were duly complied with.*

In addition to the above, certain *duties* are imposed by the act upon the mortgagor and master, and penalties are provided for their neglect. Thus, in section F, the mortgagor is required to retain a certified copy of the mortgage on board, 'to be exhibited by the master to any person having business with the vessel which may give rise to a maritime lien,' *etc.*, and the master of the vessel is required, 'upon the request of any such person', to exhibit, with the documents of the vessel, a copy of the mortgage to such person."

The preferred status of the mortgage was attacked in the Oconee case for the failure to comply with the provisions of subsection F above referred to and on this point the Court at page 934 said:

"By the terms of the act a preferred status attaches *as of the date of compliance with subdivision (a) of subsection D.* The compliance with these provisions, as has been heretofore stated, is admitted, and the statute itself nowhere

> seems to contemplate any default on the part of the mortgagee for the failure of compliance with those sections of the act *to be performed by the mortgagor and the master.* The mortgagor (the owner) is subjected to a penalty if he fails to deliver on board the ship a copy of the mortgage. The master is likewise subject to a penalty if he fails to exhibit the same when called upon. The mortgagee, in the nature of things, has no control over either, and the act clearly does not contemplate the invalidity of the mortgage by reason of such failure on their part."

It will be noted that the Court, while relieving the mortgagee from responsibility for failure to enforce the provisions of subsection E for keeping a copy of the mortgage on board the vessel and exhibiting the same, does not expressly or impliedly undertake to excuse the failure to have the mortgage indorsed, in fact it holds this act to be a "prerequisite" to obtaining the benefits of having its mortgage given a preferred status and indicates clearly, as we have before argued, that there is a clear distinction in importance between the requirement of indorsement and that of keeping the mortgage on board, etc.

In the Owego case the following paragraph is quoted from the opinion of the Court (page 405):

> "Prior to the enactment of the Ship Mortgage Act (Act June 5, 1920 [41 Stat. 1000]), ships were about as available for credit for general purposes as the snows of last December. The object of that statute was to enable the owners of vessels to use the vast capital invested in them with at least a part of the facility enjoyed by investors in structures on land. To that end the statute is remedial and should be liberally

> construed, *although all of its provisions as to registry and indorsement on the ship's papers should be complied with.* The commissioner's finding as to the validity of this mortgage is correct and the New York Trust Company is entitled to be paid out of the remnants."

In the Moshulu case, the Court in its opinion clearly indicates that the provision for the indorsement of the mortgage had been complied with, prior to the time when the claims of the libelants accrued.

As further indicating the importance which Congress placed upon the making of indorsement, we have only to refer to paragraph 2 of subsection D of the Act which provides that the mortgage shall be indorsed *before* it is recorded. This paragraph reads as follows:

> "The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so indorsed."

It might be remarked here, that it is beside the point to argue whose duty it was to see that the necessary indorsement was made on the ship's documents in accordance with the provisions of the Act. It certainly was not the duty of the Petitioner and cannot effect its status.

In the case of the *Knickerbocker Trust Company* vs. *Penn Cordage Company,* 65 N. J. E. 181, through error in the Clerk's Office, a chattel mortgage was recorded in the real property records and the court, in holding that there was a failure to record the mortgage within the meaning of the statute, said at page 193:

> "It seems to me, however, that it is not necessary to decide these questions as to whose fault it was that the mortgage was not recorded

in the chattel mortgage book. The statute, in my opinion, required that the chattel mortgage in cases where no possession is taken of the goods mortgaged, must, in order to be valid against the creditors of the mortgagor, be actually recorded in a book directed by the statute to be provided. If it be not so recorded, the chattel mortgage is void as to such creditors no matter what may have occasioned the omission to record it as required by statute."

The provision for recording the mortgage which shares in importance that of indorsing the same on the ship's papers has been construed in the case of "*The Bergen*", 7 F (2nd) 379, and the language of the District Court, S. D. California, on this point is as follows:

"(1) I find that *the prerequisites under subdivision C, D, M and other* provisions of the Ship Mortgage Act of 1920 (41 Stat. at Large, 1000, §30 Comp. St. Ann. Supp. 1923 §§ 8146¼jjj-8146¼rr), were not complied with in the Joseph mortgage. An essential to priority and preference is that the mortgage be recorded in the office of the collector of customs of the port of documentation. This was not done in the instant case. The Joseph mortgage was recorded in the office of the collector of customs of the port of Los Angeles, Cal., on May 2, 1922, but the ship at that time, and at all times until June 28, 1922, was enrolled and documented in the port of San Francisco, Cal., which at all of said times until June 28, 1922, was the home port of said vessel. The recording of the mortgage in the office of the collector of customs of the port of Los Angeles, Cal., on May 2, 1922, was ineffectual and inoperative to constitute the mort-

> gage a preferred mortgage under the Ship Mortgage Act of 1920. For these reasons the Joseph mortgage cannot be classified as a preferred mortgage and the lien thereof upon the steamship Bergen does not fall in the category of a preferred maritime lien on the vessel as against other valid maritime liens of the libelant and certain interveners."

It is worthy of note that the mortgage here under consideration was dated and signed on December 30th, 1919, when there was no such an instrument as a "preferred mortgage" recognized by law. The Ship Mortgage Act of 1920 creating the "preferred mortgage" did not become a law until June 5th, 1920. Perhaps this fact may account for the failure of the parties interested to comply with the requirements of the Act necessary to give it a preferred status.

We feel that any extended argument upon the construction of the provisions of the Ship Mortgage Act 1920 before stated, defining a preferred mortgage, is unnecessary inasmuch as there is nothing obscure, doubtful or ambiguous in the meaning or application of the words used. This position has been taken by this Court in numerous cases.

Russell Motor Car Company vs. *United States*, 261 U. S. 514. Mr. Justice Sutherland said at page 519:

> "Rules of Statutory construction are to be invoked as aids to the ascertainment of the meaning or application or words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity. *Hamilton* vs. *Rathbone*, 175 U. S. 414, 421; *United States* vs. *Barnes*, 222 U. S.

> 513, 518-519; they may not be used to create but only to remove doubt."

Corona Company vs. *United States,* 263 U. S. 537, Mr. Justice Sutherland at page 540 said in commenting on Section 154 of Judicial Code:

> "But the words of the Statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

St. Louis Iron Mountain and Southern Railway Company vs. *Taylor, Administratrix,* 210 U. S. 281, at page 295 this Court said by Justice Moody:

> "It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the Courts. They have no responsibility for the justice or wisdom of legislation and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law making body."

In the case of *Robertson,* Commissioner of Patents, *et al.,* vs. *United States ex rel.* Baff. 285 Fed. 911, the Court in its opinion at page 915 said:

> "Unless the language of a statute is vague, dubious, uncertain, indefinite, or ambiguous, or conveys a meaning that is absurd, or in contradiction of other parts of the enactment, or in contravention of the legislative purpose made evident by the enactment itself, there is no room for construction, and the meaning of the terms

actually employed in drafting a law must be accepted as manifesting the legislative intent."

In the case of *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 298 Fed. 628, the Court in the course of its opinion, at page 630, said:

> "And in determining this intent of Congress, as expressed in the act, it is the duty of the courts to read the enactment 'according to the natural import of the words used,' and, if the language used by Congress is unambiguous, there is no room for construction, nor can we speculate as to what Congress might have done, or might have intended, had the matter been specifically brought to its attention. As expressed by Mr. Sutherland in his work on Statutory Construction, 'there can be no intent of a statute not expressed in its words.' 2 Lewis' Sutherland, Statutory Construction (2nd Ed.) 745. See also *Treat* v. *White*, 181 U. S. 264, 267, 21 Sup. Ct., 611, 45 L. Ed. 853; *Dewey* v. *United States*, 178 U. S. 510, 521, 20 Sup. Ct. 981, 44 L. Ed. 1170."

POINT II.

The lien of the libelant arose prior in time to the indorsement of the fact of the mortgage on the ship's documents and is therefore a preferred maritime lien within the meaning of subsection M of the Ship Mortgage Act 1920.

The Petitioner has a maritime lien on the vessel.

As before stated, the repairs in question were furnished by the Petitioner at the special instance and request of Mr. Garmey, consulting engineer, who was

retained by the American Star Line, Inc., the owner of said vessel "Northern Star", and we feel that there is little need for any extended argument to sustain the finding of the Circuit Court of Appeals that the Petitioner has a maritime lien (R. 97). However, in view of the very extended argument by counsel for the Respondent in the courts below and the finding of the District Court on this point it seems advisable to comment briefly thereon.

The law in force at the time of furnishing the aforesaid repairs, etc., by the Petitioner, providing for maritime liens for necessaries, is found in subsections P, Q and R of the ship Mortgage Act, 1920, 41 Stat. L. 1005, which reads as follows:

> "Subsection P. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.
>
> Subsection Q. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.
>
> Subsection R. The officers and agents of a vessel specified in subsection Q shall be taken to

> include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor."

The crux of the opinion of the Court below on this point is found in the following paragraph (R. 63):

> "The terms of subsection R seem to me to clearly show the intention to include the owner of the vessel among those who, by their own agreements may be prohibited from binding the vessel, because it says, 'nothing in this section shall be construed to confer a lien', which shows plainly that the prohibition referred to is not limited to any class named therein, or in any particular subsection, but it is to be construed, in connection with the whole of section 30, including of course subsections P and Q."

Upon reference to subsection P, it will be noted that the section applies to any person furnishing repairs, etc., to any vessel upon the order of the owner, etc.

Subsection Q provides for the persons who shall be presumed to have authority from the owner.

Subsection R refers to officers and agents of the vessel specified in subsection Q.

All of these sections clearly refer one to the other, and must be read together. If read together under the doctrine *ejusdem generis*, it is clear that under sub-

section P the owner would clearly have the right to order such supplies and repairs. Under subsection Q, anybody having authority from the owner, and under subsection R, the parties mentioned in subsection Q and officers and agents of the charterer, etc. All of these provisions down to the starting of the clause "but nothing in this section" (R) etc., clearly give the owner the right to order such repairs and supplies on the credit of the vessel and confer a lien. Subsection R refers exclusively to authority from the owner, for clearly, if the owner could not give authority to a ship repair company, stevedore or tug boat concern or others, then no one would seem to have authority to authorize a lien to attach to the vessel. The intention of the Act was for the protection of the owner against the placing of unauthorized liens upon his vessel. There is nothing in the Act which states or intimates that it was for the protection of a mortgagee as against the right of the owner to place any liens upon the vessel. The duty of the mortgagee is to protect himself by complying with the provisions of the statute.

With reference to the provision in subsection R that "nothing in this section shall be construed to confer a lien where the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of * * * agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries, was without authority to bind the vessel therefor."

(a) The language "agreement for sale of the vessel" refers to a case where the owner agrees to sell the vessel to a purchaser, and the conditional purchaser in possession requests the furnisher of supplies or repairs to do certain work upon the vessel. In this case, as in the case of a charterer, it would be very clear that the furnisher's duty would be to ascertain

who was the owner of record and seeing that a party other than the person ordering repairs was the owner, he would then be put upon notice and could not obtain a lien upon the vessel, unless with the consent of the owner.

(b) The phrase "or for any other reason" refers clearly, by reason of the context, to the fact that if for any other reason the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that the party ordering the supplies did not have authority *from the owner*, as shown in subsections P and Q, that then no lien would arise. For who could give or refuse authority but the owner?

The effect of the Trial Court's construction of these words was to bring within this language an ordinary mortgage given by an absolute owner. This construction has been held to be erroneous in the case of *The Buckhannon*, 299 Fed. 519, where the Court in course of its opinion said, at page 521:

> "The Buckhannon was not a chartered ship at all; she was owned absolutely by the claimants when the events, giving rise to litigation, occurred. She was a mortgaged vessel, but it is a point too familiar to need citation that the mere fact that there is a mortgage and not a preferred mortgage upon a ship, does not in the least prevent or limit the right of her owner, or that owner's lawful agents to pledge the credit of the vessel by the incurring of a maritime lien. This is because the maritime lien is superior to the mortgage and takes no cognizance of the mortgage as such."

(c) The words "was without authority to bind the vessel therefor" refer, on reading all three sections, to authority *from the owner*.

To assert that the United States Shipping Board may make an agreement with a purchaser of a vessel which would prevent him, as owner, from incurring maritime liens, is to assert a proposition of law for which there is no reason or authority. The owner is the fountainhead and all authority and all prohibitions to a charterer, operator under a purchase agreement or owner pro hac vice come from the owner.

In the case of the *Anna E. Morse*, 286 Fed. Rep. at page 797, the court in commenting on subsection R used the following language:

> "Thus, speaking broadly, the law presumes the owner's authority in one entrusted with a ship to procure supplies on the pledge of the ship, unless the owner has withheld his authority and the furnisher knew it or by diligence could have ascertained it. * * * The exception to the remedy which the law affords one furnishing supplies, is operative only when by reason of some circumstance he either knew or by diligence could have ascertained that the person ordering these supplies was without the authority of the owner which otherwise the law presumes."

The agreement for sale of this vessel introduced by the Respondent as additional evidence in the Circuit Court of Appeals (R. 81-88) has no standing in this case whatever.

If such an agreement ever existed, it was superceded and terminated by the execution of an absolute bill of sale and the giving of a mortgage.

The American Star Line, Inc., upon the receipt of the bill of sale from the Government became the absolute owner of said vessel in place of being the conditional vendee under the alleged agreement for sale. The two capacities are absoultely inconsistent and can-

not exist contemporaneously. The Respondent contended that the terms of the agreement should be continued and carried over after the transfer of title but no agreement between the parties can change their status in law.

Whatever may have been the intention of the parties the mortgage and bill of sale which followed and superceded the agreement did not incorporate or refer to said agreement either directly or indirectly. The owner's title and legal status of the vessel must be determined from the documents of title of the vessel which are on record and cannot be affected by an unrecorded document which was wiped out by a subsequent transaction and not referred to in said transaction in any way.

The failure of the Circuit Court of Appeals to refer to this agreement in any way in its opinion, indicates how little importance was attached to it by that Court.

The lien of the libelant having arisen prior in time to the indorsement of the fact of the mortgage on the ship's documents is therefore a preferred maritime lien within the meaning of subsection M of the Ship Mortgage Act.

This must clearly appear from a reading of said subsection M, which is as follows:

> "(a) When used hereinafter in this section the term 'preferred maritime lien' means (1) *a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section;* or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the

vessel, for general average, and for salvage, including contract salvage.

"(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection I, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the Court."

The definition of a preferred maritime lien, above given as "a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section", clearly indicates that it was the intent of Congress to allow any such liens as might be created prior to the carrying out of all the requirements necessary to make a mortgage a preferred mortgage and clearly sustains the claims of the Petitioner that the making of such indorsement is mandatory if a mortgagee is to have the benefits derived from having his mortgage classed as a preferred mortgage.

However, regardless of whether indorsement is mandatory to give a mortgage a preferred status, in any event subsection M expressly provides that the mortgage shall be subordinate to a lien arising under the conditions mentioned therein.

The expression "recording and indorsement", as here

used, is conjunctive and consequently a lien which has arisen prior to either of the essential acts of recording or indorsing is a preferred maritime lien within the meaning of the Act.

A similar expression has been construed in the case of *Heitz* vs. *Ruppert* (218 N. Y. 148) that Court, Judge Pound writing the opinion, considered the meaning of the words "arising out of and in the course of employment." He said:

> "The words are conjunctive and relief can be had under the act only when the act arose both 'out of' and 'in the course of' employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident to the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work."

In the case of *Rice et al.* v. *United States*, 33 Fed. 910, the Court in the course of its opinion, at page 911, said in this connection:

> "To give the effect to this phrase contended for by the government, we must either change the word 'and' to 'or' or add words which would have the effect to compel the word 'and' to be read and taken disjunctively and distributively. This is sometimes done, but, when it is, the reason for so doing must be very cogent. The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear.
>
> Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It cannot sub-

> stitute, for the clear expressions which Congress has actually used, other expressions, which the court think Congress ought to have used. Undoubtedly, 'and' is not always to be taken conjunctively. It is sometimes read as if it were 'or', and taken disjunctively and distributively, but this is only done where that reading is necessary to give effect to the intention of the legislature, as plainly expressed in other parts of the act, or deducible therefrom."

Further, that the act contemplated the power in the mortgagor to create a preferred maritime lien before indorsement, even though the mortgage had been recorded, is shown by subsection F, a part of which subsection reads as follows:

> "The mortgagor * * * 2—without the consent of the mortgagee shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have indorsements in respect thereto made upon the documents of the vessel, any contractual obligation creating a lien upon the vessel * * *."

This section obligates only the mortgagor and mortgagee. It does not and cannot affect the rights of third parties, otherwise a situation might be created where there never could be a preferred maritime lien against the vessel, as in case where the mortgagee refrains from having the mortgage indorsed upon the ship's papers.

In any event, the prohibition, as the statute plainly says, continues only for a reasonable time, while in the instant case the mortgagee failed to have the indorsement made until June 27, 1921, when his mortgage was in fact recorded in August, 1920, and opportunity to

have such indorsement on the ship's papers was afforded by the fact that the vessel was entered in the Port of New York on September 21, 1920, and at other times prior to the time of making the indorsement. Therefore, after the reasonable time provided in subsection F, subdivision 2, any liens which are incurred are clearly preferred maritime liens within the meaning of subsection M.

If Congress had intended that the recording of a mortgage alone would be sufficient to prevent any maritime liens acquired thereafter becoming preferred maritime liens, there would have been no occasion whatever for the use of the word "indorsement" in this connection.

The decree of the Circuit Court of Appeals should be reversed insofar as it holds that the maritime lien of the petitioner is junior to the lien of the respondent Luber and that the mortgage of the respondent is a preferred mortgage within the terms of the Act. The petitioner should be held to have a maritime lien on said Steamship "Northern Star" superior to the mortgage of the respondent and an order made directing the entry of a final decree in favor of the petitioner in the sum of One Thousand Seven Hundred and Five and 87/100 Dollars ($1,705.87) together with interest and costs.

Respectfully submitted,

BARBER & STETSON,
Proctors for Petitioner.